



DEPARTMENT OF THE ARMY  
DEFENSE LANGUAGE INSTITUTE FOREIGN LANGUAGE CENTER  
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ATZP-JA

30 November 2018

MEMORANDUM FOR ALL

SUBJECT: The Freedom of Information Act (FOIA) and Electronic Records

1. PURPOSE: To familiarize employees with the FOIA and its applicability to items created in electronic formats.

2. REFERENCES:

a. The Freedom of Information Act, 5 U.S.C. § 552, as amended by the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-23 1, 110 Stat. 3 048.

b. Army Regulation (AR) 25-55, the Department of the Army Freedom of Information Act Program, 1 November 1997.

c. Memorandum for Secretaries of the Military Departments, Withholding of Personally Identifying Information Under the Freedom of Information Act, 01 September 2005.

d. DoDM 5400.07, DoD Freedom of Information Act Program, 25 January 2017

3. DISCUSSION:

a. Upon request, any member of the public, including soldiers and federal employees, may obtain most non-exempted government records under the Freedom of Information Act (FOIA).

b. A 1996 amendment to the FOIA changed the definition of "records" to include those created and maintained in electronic format. Accordingly, members of the public are now entitled to obtain most email traffic under the FOIA. Email traffic subject to release includes: email traffic dealing with Department of Defense (DoD) missions or business, email records kept for business purposes to be used in other actions or that will be repeatedly retrieved, and emails reflecting policies, procedures, actions, or decisions. In contrast, email traffic that is not related to DoD missions or business is generally considered personal correspondence.

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c. Products of data compilation, such as books, papers, maps, and photographs, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law are classified as an "agency record" and may be subject to release under the FOIA. AR 25-55, para. 1-402. The following are not included within the definition of the word "record."

(1) Objects or articles, such as structures, furniture, vehicles and equipment, whatever their historical value, or value as evidence.

(2) Administrative tools by which records are created, stored, and retrieved, if not created or used as sources of information about organizations, policies, functions, decisions, or procedures of a DoD component. Normally, computer software, including source code, object code, and listings of source and object codes, regardless of medium, are not agency records.

(3) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(4) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use.

(5) Information stored within a computer for which there is no existing computer program for retrieval of the requested information.

d. Privacy and Protecting Personally Identifiable Information (PII). Generally, the public has the right to access records concerning United States Government activities, including those of the Department of Defense and United States Army. DoDM 5400.07, 3.1(a) However, caution must be exercised when a request made under the FOIA seeks or may otherwise disclose PII. Records containing PII may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law or subject to discretionary release. AR 25-55, para. 3-200. See *also* DoDM 5400.07, 3.1(a) Accordingly, information in personnel and medical files, as well as *similar* personal information in other files may be withheld pursuant to the above references

(1) Examples of information which may be withheld under the PII exemption can include: employment or security clearance suitability evaluations and adjudications; files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, was taken and; home addresses, as well as lists of DoD military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories. AR 25-55, para. 3-200, Exemption Number 6.

(2) However, telephone directories, organization charts, and/or staff directories published by installations or activities will be released when requested under FOIA.

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(3) The improper release of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and may subject the *releaser* to civil and criminal penalties. AR 25-55, para. 3-200, Exemption Number 6.

e. Record Retention. The provisions of the FOIA permit the release of non-exempted records for purposes of litigation, such as tort claims and contract disputes. AR 25-55, para. 5-101(e). As the FOIA also applies to electronically created records, it is imperative that individual Army components and employees exercise care in preserving electronic records under their control, as well as understand when electronic records must be retained for purposes of litigation.

(1) To ensure adequate preservation of records, including electronic records subject to FOIA requests, a legal, or “litigation hold”, may be instituted by the OSJA. A litigation hold may be issued if there is a “reasonable anticipation” of forthcoming litigation. In the event litigation is reasonably anticipated, OSJA will issue a litigation hold to individual instillation components and employees who are believed to have “potentially relevant evidence” under their custody or control.

(2) Following the institution of a litigation hold, individual instillation components and employees subject to the hold must preserve all information and records potentially relevant to the legal action at issue. Preservation of evidence following the institution of a litigation hold may require suspending normal practices of record retention, such as scheduled deletion or destruction of records, during the pendency of the issued hold.

4. Point of contact is the undersigned at (831) 242-6414.

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